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No. 83-378

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BIG SPRING INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

JAMES GRIFFEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, the plaintiff in this action, submits this brief pursuant to the Clerk's letter of October 13, 1983 advising that the Court wishes a response to the petition for writ of certiorari. For the reasons stated herein, respondent believes that the petition should be denied.

SUMMARY OF ARGUMENT

The district court granted summary judgment dismissing this action on two grounds: untimeliness and collateral estoppel. The court of appeals, in the decision challenged here, reversed on both grounds and remanded for further proceedings. Nothing about that decision warrants review by this Court.

1. The court below, recognizing that a two-year time limit controls this race discrimination action brought un-

der 42 U.S.C. §§ 1981, 1983 and 1985, held that the complaint was timely even though filed 25 months after respondent was notified of non-renewal of his employment, because 3½ months of that period were not to be counted by virtue of Texas' tolling statute. Petitioners seek review of the construction of the Texas tolling statute reached by the court below. That question of state law does not warrant this Court's attention, and in any event was correctly decided below.

The court below also noted that *even without tolling* the complaint would have been timely as to one of its claims: that petitioners' decision not to rescind the non-renewal following a hearing that was accorded under the school board's policies (an event that occurred less than two years prior to the filing of the complaint) was *itself* discriminatorily motivated. Petitioners assert that the analysis of the court below is inconsistent with this Court's decisions in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981). As the court below observed, the state-law tolling ruling rendered this alternative analysis mere *dictum*. In any event, the analysis below is plainly correct, and does not conflict with *Ricks* or *Chardon*.

2. Although the court below assumed *arguendo* that fact-findings by a state board of education generally are entitled to preclusive effect in a subsequent action under 42 U.S.C. §§ 1981, 1983 and 1985, it concluded that a combination of circumstances present here brought this case within the exception that pertains when "there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in the prior litigation." *Montana* v. *United States*, 440 U.S. 147, 164 n.11 (1979), quoted in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 481 (1982). This case involves the application of that well-recognized exception to a unique, non-recurring set of facts. Moreover, the disposition of the court below on that unique set of facts is unobjectionable. For both reasons, the ruling does not warrant this Court's attention.

ARGUMENT

I. THE TIMELINESS RULING.

Petitioners proffer two "questions presented" that are addressed to the ruling below that respondent's complaint was timely. The first question presented relates to analysis by the court below that was *dictum*, given the ruling below that is challenged in the second question presented. Accordingly, we begin with the second question presented, and then discuss the first.

A. In their second question presented, petitioners seek review of the holding below that the time limit for filing the complaint in this action was tolled for 3½ months. That holding—which turned on a construction of state law—does not warrant review in this Court.

As Congress has prescribed no statute of limitations for actions brought under 42 U.S.C. §§ 1981, 1983 and 1985, the timeliness of such actions is determined by "borrowing" the state law of limitations governing analogous causes of action. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-484 (1980). The district court and court of appeals both held that the most analogous Texas statute of limitations is Tex. Rev. Civ. Stat. Ann. Art. 5526 (Vernon 1958), which prescribes a two-year time limit (App. B 42; B 5, 7-8). Petitioners do not dispute the correctness of that choice (Pet. 17), nor do we.

Respondent's lawsuit was filed 25 months after the May, 1977 notification that his employment would not be renewed by the petitioner school district. The court below concluded, however, that the running of the time limit was tolled for a period of 3½ months and accordingly that the two-year time limit had not expired. The suit was timely, the court below reasoned, because (1) during the two-year time limit respondent had instituted a state court proceeding to overturn the nonrenewal decision, (2) that lawsuit was dismissed for lack of juris-

diction 3½ months after it was filed, and (3) by operation of the Texas tolling statute, Tex. Rev. Civ. Stat. Ann. Art. 5539a (Vernon 1958), the time during which that state court action was pending is not to be counted in determining whether the time limit had run. (App. B 10-24).

The court below was correct in understanding the tolling question to be one governed by state law, *Tomanio*, *supra*, 446 U.S. at 483-486, and petitioners do not contend otherwise.[1] Petitioners' contend, rather, that the court of appeals misconstrued the Texas tolling statute; petitioners ask this Court to grant certiorari to decide what is the proper construction of that Texas statute as applied to the facts of this case. The pertinent "question presented" is stated in the petition as follows (Pet. i):

> 2. Whether an appeal from a decision of the Texas State Board of Education to the State District Court is the "same action" as a suit filed in United States District Court alleging violation of civil rights under 42 U.S.C. § 1981, 1983, and 1985, *within the meaning of the Texas tolling statute*? [Emphasis added].

The proper construction of Texas' tolling statute is not a question that merits this Court's attention. In any event, the court of appeals' construction of the Texas tolling statute is correct, for the reasons stated at length in its opinion (App. B 10-24). Indeed, even if that construction were fairly open to debate, it represents the unanimous view of three experienced Texas judges on the Fifth Circuit, and this Court therefore should not disturb it "even if an examination of the state-law issue without such guidance might have justified a different

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[1] *Tomanio* held that state law governs tolling unless "state law is 'inconsistent with the Constitution and laws of the United States'." 446 U.S. at 485. Petitioners do not contend that the state tolling statute, as construed by the court below, is inconsistent with the Constitution and laws of the United States.

conclusion." *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976); and see, cases cited and described therein at 346-347 n.10.

B. While the tolling ruling just discussed was fully dispositive of the timeliness issue in this case, the court of appeals proffered an additional rationale that would have sustained a *portion* of the complaint *even in the absence of tolling*. The court below understood the complaint to be alleging two separate and independent discriminatorily-motivated acts, the first on May 13, 1977 (when the school board notified respondent that his contract would not be renewed), and the second on June 9, 1977 (when, following a hearing mandated by the school board's written policies, the school board opted not to rescind the prior decision of non-renewal). Inasmuch as the complaint was filed on June 8, 1979—less than two years after the hearing—the court below concluded that even without tolling the complaint would have been timely as to the second challenged act, and thus that even without tolling respondent would have been entitled to litigate his challenge to *that* act (albeit not to the earlier act).

Petitioners' first "question presented" (Pet. i) seeks review of the correctness of this conclusion; the petition contends that the conclusion is inconsistent with this Court's decisions in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (Pet. 15-32). The question does not warrant review in this Court both because it is mere *dictum* in light of the tolling ruling, and because the conclusion below is plainly correct.

The court below recognized that, but for tolling, the challenge to the May decision would have been time-barred, because the decision was made (and respondent learned of it) 25 months prior to the filing of the complaint. The court below explained that under the principle of *Ricks*, *supra*, the cause of action challenging that decision as discriminatorily-motivated accrued when respondent was notified of it, even though there were post-

decision avenues through which respondent could seek to persuade the school board to rescind the decision and even though the loss of employment resulting from the decision had not yet occurred (App. B 7-8).

But the court below understood the complaint to allege that "an independent actionable event" occurred on June 9, 1977, when the school board, following a hearing, refused "on account of Plaintiff's race" to rescind the prior decision of nno-renewal (App. B 8). As the complaint was filed on June 8, 1979—less than two years after the refusal to rescind the non-renewal—the court below reasoned that even without tolling the challenge to the refusal to rescind the non-renewal would be timely. The court below rejected the school board's argument (which the district court had embraced) that as the school board's action on June 9, 1977, was one of omission there could be no cause of action arising on that date:

> We are not persuaded that a sin of omission cannot be an actionable event.
>
> The board, by its own rules, was obligated to give Griffen a hearing. A hearing necessitates a decision whether to alter the status quo. The fact that the board chose to preserve the status quo does not cause the decision to evaporate into the mists. If the decision to preserve the status quo were nondiscriminatory . . . Griffen will not prevail. On the other hand, *Griffen might well be able to show that the decision to preserve the status quo was itself discriminatorily motivated.* [App. B 9; emphasis added].

This Court's decision in *Ricks*, the court below concluded, would not preclude plaintiff from attempting to make *that* showing in a lawsuit filed within two years of the June 9 hearing and decision not to rescind the non-renewal (*ibid.*).

Even if the analysis below were subject to doubt—and even if a holding that depended on that analysis would warrant this Court's review—in *this* case the analysis

was of no significance to the outcome, as the court below observed (App. B 10). For the separate tolling ruling meant that the complaint was timely as to *all* of its allegations. The ruling challenged in petitioner's first "question presented" was mere *dictum*. This Court could reach petitioner's first "question presented" only if it first addressed the second "question presented" (the proper construction of the Texas tolling statute) and reversed the construction of the Texas statute arrived at by the court below.

In any event, the analysis of the court below is plainly correct, and assuredly does not conflict with either *Ricks* or *Chardon*. In both *Ricks* and *Chardon*, the only act alleged by the complaint to have been discriminatorily-motivated was the original decision to terminate the plaintiff's employment. In both cases, this Court emphasized that its holding was predicated on the fact that no subsequent event was alleged to have been discriminatorily-motivated. *Ricks*, 449 U.S at 257 & n.8; *Chardon*, 454 U.S. at 8. Here, by contrast, the complaint alleged that a decision made on a later date—the decision not to rescind the non-renewal—was itself discriminatorily-motivated; and the complaint was filed within the limitations period applicable to a wrong committed on that date.

II. THE COLLATERAL ESTOPPEL RULING.

The court below did not address, and this case does not present, the question whether fact-findings by a state board of education are *generally* entitled to preclusive (collateral estoppel) effect when a teacher subsequently institutes an action under 42 U.S.C. §§ 1981, 1983 and 1985.[2] The court below assumed *arguendo* that State

[2] Cf. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 470 n.7 ("unreviewed administrative determinations by state agencies" do not have preclusive effect in subsequent actions brought under Title VII of Civil Rights Acts of 1964 "even if such a decision were to be accorded preclusive effect in a State's own courts"). And see,

Board fact-findings generally are entitled to preclusive effect in subsequent actions under §§ 1981, 1983 and 1985 (App. B 26), but concluded that this case falls within the exception that pertains when "there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in the prior litigation." *Montana* v. *United States*, 440 U.S. 147, 164 n.11 (1979), quoted in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 481 (1982).

The court below cited several factors that collectively, in its judgment, constituted "good reason to doubt the quality, extensiveness and fairness of the procedures followed" (App. B 26):

1. The hearing officer, before whom the witnesses for both sides had testified, found on the basis of credibility determinations that the non-renewal of plaintiff's employment had been motivated by race—a finding that was adopted by the State Commissioner of Education.[3] On

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McDonald v. *City of West Branch Mich.*, No. 83-219, *cert. granted*, 52 USLW 3262 (Oct. 3, 1983) (whether arbitrator's fact-findings are preclusive in subsequent § 1983 action).

[3] The hearing officer's "proposal for decision" (P. Ex. 22)—which became the decision of the Commissioner of Education (P. Ex. 23)—stated: "[I]n those instances where testimony is in direct conflict, the Hearing Officer is charged with the duty to judge the credibility of witnesses and to ascertain the facts which the evidence, considered as a whole, tends to prove." (P. Ex. 22, p. 3). Among the specific findings upon which the Hearing Officer predicted his ultimate finding of discriminatory motivation were these: Plaintiff had an unblemished record spanning several years in the School District as teacher and head high school basketball coach. The School District employed a new Athletic Director (petitioner Don Robbins) in January 1976. Robbins immediately suggested that plaintiff resign, explaining that he (Robbins) "didn't feel Big Spring was ready for a head black coach." Robbins told one of plaintiff's basketball students "[y]ou have to be a Nigger and nine-feet-five in order to play basketball." Plaintiff was the only coach in the school district who was assigned the responsibility of handling the team's laundry without compensation. Robbins recommended that plaintiff's contract not be renewed, and it was Robbins'

the school board's appeal from the Commissioner of Education's decision, the State Board reached the opposite finding as to motivation without acknowledging the hearing officer's contrary credibility determinations and without offering any explanation for its decision not to honor them (App. B 29-32).

2. The State Board's decision finding innocent motivation was authored by the very school board whose motivation was in issue, having been prepared by the school board and furnished to the State Board in response to an *ex parte* request by a representative of the State Board (App. B 33-35).[4]

3. That *ex parte* request was made three days *prior* to the date upon which the 24-member State Board was scheduled to meet to deliberate and arrive at its decision (App. B 34-35).

4. Plaintiff received no similar invitation to make a last-minute submission to the State Board. In the words of the court below:

> It is one thing for a judge in open court to render an oral decision and ask the prevailing party to produce a written decision in accord with the already-rendered oral decision. It is another thing when a party is asked *ex parte* to prepare written findings in advance of the actual (or nominal) time of the decision, and not even allow the other party an opportunity to respond. [App. B 34]

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recommendation that was the effective cause of the non-renewal decision. The innocent explanations proffered at the hearing by the school board for the non-renewal decision were trivial, factually unsupported, and "mere pretexts" masking the real reason which was "impermissible racial discrimination" (P. Ex. 22, pp. 3-7).

[4] As the court below noted, this was not the only *ex parte* communication between the school board and the State Board during the pendency of the school board's appeal. Earlier, a member of the State Board had asked the school district's superintendent "to send him some material in regard to" the case (App. B 3-4).

The court below explained that it might not have found the exception to collateral estoppel applicable on the basis of any one of these factors alone, but that the presence of all of them in combination rendered the State Board finding unworthy of collateral estoppel effect (App. B 35). Thus, this case involves the application of undisputed legal principles to a unique, non-recurring set of facts, and for that reason does not warrant this Court's attention.

Furthermore, the disposition of the court below on this set of facts is unobjectionable: it is hardly surprising that a court would decline to give collateral estoppel effect to "findings" that emerged in these circumstances. And, in any event, a review of that court's assessment of these unique goings-on could have no precedential value for other cases and for that reason as well does not warrant this Court's time and attention.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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